

INDEX

Opinion below	Page
Jurisdiction	1
Questions presented	2
Statute and regulations involved	3
Statement	5
Argument	8
Conclusion	15

CITATIONS

Cases:

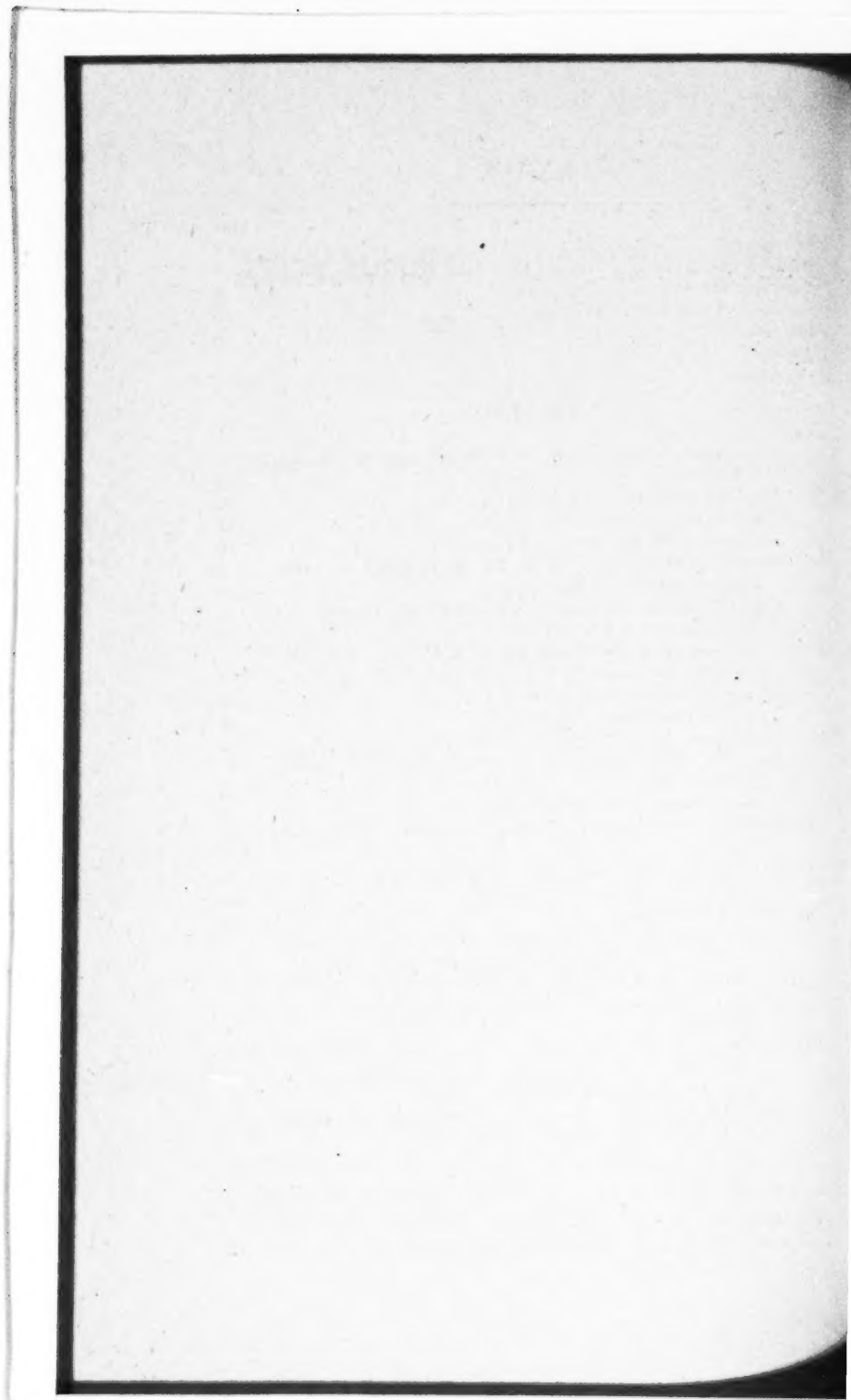
<i>Armstrong v. United States</i> , 16 F. 2d 62, certiorari denied, 273 U. S. 766	12
<i>Bain, Ex parte</i> , 121 U. S. 1	12
<i>Crain v. United States</i> , 162 U. S. 625	12
<i>Friedman v. United States</i> , 276 Fed. 792	9
<i>Funk v. United States</i> , 66 F. 2d 70, reversed on other grounds, 290 U. S. 371	9
<i>Grand Trunk Ry. Co v. United States</i> , 229 Fed. 116, certiorari denied, 241 U. S. 681	9
<i>Hirabayashi v. United States</i> , 320 U. S. 81	15
<i>Jones v. United States</i> , 72 F. 2d 873	9
<i>Muncy v. United States</i> , 289 Fed. 780	12
<i>Pines v. United States</i> , 123 F. 2d 825	12
<i>Pinkerton v. United States</i> , 328 U. S. 640	15
<i>Randall v. United States</i> , 148 F. 2d 234, certiorari denied, 325 U. S. 885	9
<i>Stine v. United States</i> , 32 F. 2d 742	9
<i>United States v. Cox</i> , 147 F. 2d 587, certiorari denied, 325 U. S. 858	9
<i>Van Dam v. United States</i> , 23 F. 2d 235	9
<i>Walker v. United States</i> , 7 F. 2d 309	12

Statutes and regulations:

Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177 (50 U. S. C. App., Supp. V, 633, 1152):	
Sec. 2 (a) (2)	3
Sec. 2 (a) (5)	3, 5
Sec. 2 (a) (8)	4
Criminal Code, Sec. 332 (18 U. S. C. 550)	11
General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746):	
Sec. 1.2	13
Sec. 2.5	4, 5, 9
Sec. 2.6	4, 5, 9

Miscellaneous:

Rule 7 (e), Federal Rules of Criminal Procedure	12
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 276

WILLIAM H. FREDRICK AND NATHAN GILBERT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 399-423) ¹ has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 18, 1947 (R. 424). The petition for a writ of certiorari was filed August 18, 1947. The jurisdiction of this Court is invoked

¹ The record is in three volumes. The designation "R." is used herein to refer collectively to volumes 2 and 3, the pagination of which is consecutive. References to volume 1, where necessary, are indicated by the designation "1 R."

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an allegation that unlawfully acquired counterfeit ration stamps "purported to be valid" for a certain month was surplusage.

2. Whether proof that shortly following unlawful purchases of meat and sugar ration stamps by the operators of a meat market large quantities of counterfeit ration stamps of those categories were deposited in the market's bank account by an employee of the market was admissible as further evidence of the unlawful purchases and to prove the counterfeit nature of the stamps purchased.

3. Whether the evidence is sufficient to sustain petitioner Gilbert's conviction of unlawfully acquiring counterfeit ration stamps.

4. Whether the information was duplicitous because it charged the acquisition of counterfeit and forged ration stamps, the stamps in question being counterfeit, not forged.

5. Whether it was within the trial court's discretion to grant the Government's motion, made near the close of the Government's case, to amend the information by substituting the words "ration documents" for "ration coupons," thereby correcting a technical misdescription of the documents involved.

6. Whether the trial court erred in its instructions to the jury.

STATUTE AND REGULATIONS INVOLVED

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177 (50 U. S. C. App., Supp. V, 633, 1152), provides in pertinent part:

SEC. 2 (a) (2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provided in pertinent part during May 1945, when the offenses charged were allegedly committed:

SECTION 2.5. *Acquisition, use, transfer or possession of counterfeited or forged ration document.*—(a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SECTION 2.6. *Acquisition, use, transfer, or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. * * *

STATEMENT

On January 22, 1946, an information in eleven counts (1 R. 2-18) was filed in the District Court for the Southern District of California charging petitioners with violations of Section 2 (a) (5) of the Act of June 28, 1940, as amended (*supra*, p. 3) and Sections 2.5 and 2.6 of General Ration Order No. 8 (*supra*, p. 4). The first eight counts were dismissed with the consent of the Government at the close of its case (R. 285) and need not be considered. Counts 9 and 10 charged that in May 1945 petitioners acquired, possessed, and controlled specified quantities of "counterfeit and forged" meat ration "coupons"² "purporting to be valid for the month of May, 1945" and that petitioners were not persons or agents of persons to whom the coupons were issued or by whom they were acquired in accordance with any ration order, the coupons having been acquired not in connection with any transfers of food, but by purchase. Count 11 charged a like offense involving sugar ration coupons. Following a jury trial, petitioners were found

² On motion of the Government, made just prior to the close of its case, the information was amended by the substitution of the word "documents" for "coupons" in counts 9, 10, and 11 (R. 273, 294). This amendment is the subject of one of the contentions of the petition for certiorari (*infra*, pp. 12-13).

guilty on all three of these remaining counts (1 R. 31). Petitioner Fredrick was sentenced to six months' imprisonment on each count, the terms to run concurrently, and fined \$2,500 on each of counts 9 and 11. Petitioner Gilbert was sentenced to 90 days' imprisonment on each count, the terms to run concurrently, and fined \$1,250 on each of counts 9 and 11. Execution of both sentences of imprisonment was suspended and petitioners were placed on probation for two years. (1 R. 36-39.) On appeal, the judgments of conviction were affirmed (R. 424).

The evidence adduced by the Government may be summarized as follows:

Petitioners are partners who operate two meat and grocery markets known as Hollywood Ranch Market and Bill's Ranch Market, located in Hollywood and Burbank, California, respectively (R. 302). Around the first week in April 1945, petitioner Gilbert inquired of one Max Jones if he knew where Gilbert "could get meat stamps." Jones replied that he "didn't know at the present time" but that he "would find out." Gilbert told Jones that he "could use some" if Jones "could get some." (R. 134-135.)

Several days later Jones introduced one Al Becker to Gilbert and told Gilbert that Becker "might be able to locate some ration points for him" (R. 136-137, 157). Jones asked Gilbert how many "points" he needed and Gilbert re-

plied, "Approximately 100,000." Becker told Gilbert that he would try to get them for him. (R. 157-158.) Thereafter, having learned of a source of "red points," Becker telephoned Gilbert to inquire if he "still wanted his points" and Gilbert advised that he did (R. 187-188).

A week or two later, Becker took a "package of [100,000] points" to Gilbert at Bill's Ranch Market, but Gilbert directed Becker to go to the Hollywood Ranch Market and "ask for Bill Fredrick" (R. 158-159, 194). Becker then went to the Hollywood Market, showed petitioner Fredrick a number of envelopes, and told him that "those were the points that he wanted." After examining the stamps contained in several of the envelopes, Fredrick said that he "didn't know * * * whether they were good or bad or what they were," and expressed a desire to "check" them. Accordingly, Becker left with Fredrick as samples a number of the stamps, which were "red points". (R. 159-161, 166.)

Several weeks later, following several telephone conversations in which Fredrick told Becker that he was still "checking" the stamps (R. 161), Becker again visited Fredrick. This time Fredrick purchased 6,000 meat ration stamps, representing 60,000 points, for \$600 (R. 162-164, 166). A few weeks later Fredrick purchased from Becker approximately 20,000 additional meat ration stamps, representing 200,000 points, and an

"envelope of sugar stamps," all for approximately \$2,000 (R. 164-167).

A month or six weeks following Becker's introduction to petitioner Gilbert by Jones, Gilbert complained to Jones that "the stamps that they had gotten from Becker * * * had turned out to be counterfeits" (R. 137-138).

Alma Keevy, a clerk in the O. P. A. verification center in San Francisco (R. 40-41), testified that some 8,000 out of 14,000 meat ration stamps (Gov. Exs. 1-18, R. 29-31, 90) and 3,500 out of 3,800 sugar ration stamps (Gov. Exs. 21-28, R. 59, 92) deposited by the Hollywood Ranch Market in the Hollywood State Bank in May 1945 (R. 27-38, 59-60, 87-88, 91-92) were counterfeit (R. 58, 62).

Thaddeus Loud, an agent of the O. P. A. Currency Protection Branch (R. 230), testified that some 25,000 out of 41,000 additional meat ration stamps (Gov. Ex. 34, R. 95, 250) deposited by the same market in the same bank later in May 1945 (R. 99, 234, 243) were also counterfeit (R. 243).

ARGUMENT

1. Petitioners contend that the Government's proof of the charges contained in counts 9 and 10 was defective because it was not established that the meat-ration stamps involved in those counts "purported to be valid for the month of May 1945," as alleged (Pet. 3, 5, 18-19). However, this allegation of the two counts was sur-

plusage in describing the stamps involved. The Government was required to establish only the essential elements of the offenses, *viz.*, that petitioners acquired counterfeit ration documents, not being persons or the agents of persons to whom the documents were issued or by whom they were acquired in accordance with a ration order (Section 2.5 and 2.6 of General Ration Order No. 8, *supra*, p. 4). Cf. *Randall v. United States*, 148 F. 2d 234, 235 (C. C. A. 5), certiorari denied, 325 U. S. 885; *United States v. Cox*, 147 F. 2d 587, 588-589 (C. C. A. 7), certiorari denied, 325 U. S. 858. Nonessential allegations of an indictment or information, i. e., surplusage, need not be proved. *Jones v. United States*, 72 F. 2d 873 (C. C. A. 7); *Funk v. United States*, 66 F. 2d 70 (C. C. A. 4), reversed on other grounds, 290 U. S. 371; *Stine v. United States*, 32 F. 2d 742, 743-744 (C. C. A. 8); *Van Dam v. United States*, 23 F. 2d 235, 238 (C. C. A. 6); *Friedman v. United States*, 276 Fed. 792, 795-796 (C. C. A. 2); *Grand Trunk Ry. Co. v. United States*, 229 Fed. 116, 119 (C. C. A. 7), certiorari denied, 241 U. S. 681.³

³ The trial court, it is true, charged the jury that the prosecution was required to prove beyond a reasonable doubt that the stamps involved in counts 9 and 10 purported to be valid for the month of May 1945 (R. 379), but this instruction was, in consequence of the rule stated in the text, more favorable to petitioners than was required. In any event, the counterfeit meat-ration stamps found in petitioners' bank account, which were deposited in May 1945 (see *supra*,

2. Petitioners contend (Pet. 3-4, 5, 20-22) that it was error for the trial court to refuse to strike the testimony and exhibits introduced by the Government to show that vast quantities of counterfeit meat and sugar ration stamps were deposited by the Hollywood Ranch Market in the Hollywood State Bank in May 1945 (*supra*, p. 8). The basis of this contention is that the evidence showed that these deposits were made, not by petitioners or either of them, but by one Freeman, the office manager of the Hollywood Ranch Market (Pet. 21). Petitioners' argument is clearly without merit. Freeman was in the employ of petitioners, who operated the Hollywood Ranch Market as partners. The evidence that shortly following the unlawful purchases of meat and sugar ration stamps by petitioners from Becker large quantities of counterfeit stamps of those categories turned up in petitioners' bank account was manifestly relevant, not only to support Becker's testimony as to the sales, but also to show that the stamps so purchased were counterfeit. Cf. R. 247-248.

3. Petitioner Gilbert contends that the evidence is insufficient to sustain the verdict as to him because he was not shown to have participated

p. 8), were in evidence (Gov. Exs. 1-18, R. 29-31, 90; Gov. Ex. 34, R. 95, 250), and the O. P. A. order validating their genuine counterparts for the month of May 1945 was published at 10 F. R. 4715, thus providing a basis for judicial notice of the fact of their validation for that month.

in the actual purchases (Pet. 4, 5, 23). The Government proved, however, that it was Gilbert who first broached with the witness Jones the matter of illicitly procuring ration stamps, that it was Gilbert to whom Jones introduced Becker as a man who might be able to help him, that it was Gilbert who estimated to Becker the number of stamps desired as "Approximately 100,000," and that it was Gilbert who told Becker that he "still wanted his points" when Becker called to tell him he had located some stamps. When Becker brought the stamps thus requested, moreover, Gilbert referred Becker to his partner, Fredrick, who completed the negotiations initiated by Gilbert by making the actual purchases. Finally, Gilbert complained to Jones, following the discovery of the scheme by the authorities, that the stamps "had turned out to be counterfeits." (*Supra*, pp. 6-8.) It would be difficult to imagine a clearer case of aiding and abetting, not to mention procuring, the commission of an offense (Section 332 of the Criminal Code, 18 U. S. C. 550).

4. Petitioners contend that the counts involved should have been dismissed as duplicitous because they charged the acquisition of counterfeit *and* forged ration documents, whereas the documents were in fact counterfeit, and not forged (Pet. 4, 5-6, 23-24). The contention is without merit, since it was proper to allege in the conjunctive both of the characteristics of such documents

specified in the ration order in the disjunctive. See *Crain v. United States*, 162 U. S. 625, 636; *Pines v. United States*, 123 F. 2d 825, 828-829 (C. C. A. 8).

5. Petitioners contend (Pet. 4, 6, 25-28) that the trial court erred in granting the Government's motion, made just prior to the close of the Government's case, to amend the information by substituting the word "documents" for "coupons" in counts 9, 10, and 11 (see note 2, *supra*, p. 5). It is well settled, however, that an information, being drawn by the United States Attorney and not founded on the oath of a grand jury, may be amended by leave of court at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. *Armstrong v. United States*, 16 F. 2d 62, 64 (C. C. A. 9), certiorari denied, 273 U. S. 766; *Walker v. United States*, 7 F. 2d 309, 311 (C. C. A. 9); *Muncy v. United States*, 289 Fed. 780, 781 (C. C. A. 4); Rule 7 (e), F. R. Crim. P.*; cf. *Ex parte Bain*, 121 U. S. 1, 6. The occasion for the amendment in this case was the fact that, as elicited on cross-examination of government witness Loud (R. 268-273), the documents involved were, technically

* The Federal Rules of Criminal Procedure took effect on March 21, 1946, following the trial in the instant case. The Advisory Committee's note to Rule 7 (e) points out, however, that "This rule continues the existing law that, unlike an indictment, an information may be amended."

speaking, ration stamps rather than ration coupons. The amendment accordingly substituted the generic word "documents" for "coupons." There was at no time during the trial any question as to the nature of the ration documents involved in this case. As the court below pointed out (R. 415), it was clearly within the discretion of the trial court to permit the purely technical misdescription of the stamps as "coupons" to be corrected.³

6. Petitioners finally contend that the trial court erred in its instructions to the jury in twelve specified respects (Pet. 28-35). Petitioners took no exception, however, to any of these instructions (see Pet. 34) except the one which they discuss under their point 11 (Pet. 34-35). In respect of this instruction, it was not clear to the court, nor is it clear to us, to what petitioners' counsel was excepting. In any event, this instruction and the others criticized by petitioners seem to us to be so clearly correct as not to justify discussion of them here, except in respect of the instruction discussed by petitioners under their point 2 (Pet. 30-31). That instruction, in pertinent part, was as follows: "* * * if you believe that either defendant * * * committed any offense

³ Contrary to petitioners' assertion that "the term 'document' is nowhere defined in any of the ration orders—it could mean anything" (Pet. 28), Section 1.2 of General Ration Order No. 8, defined "ration document" to mean "* * * stamp, * * * coupon, * * *" (8 F. R. 3783).

or * * * aided or abetted in the commission of the offense * * *, then he * * * should be convicted. * * *” (R. 393). Petitioners criticize this instruction on the ground that it permitted the jury to convict if they found that petitioners committed *any* offense, whether charged in the information or not. When this instruction is considered in the context of the instruction as a whole, however, there was no possibility that the jury might have entertained any such misapprehension as petitioners now suggest. The instruction now criticized was given to the jury when, after having retired to consider their verdict, they returned to the courtroom and asked for additional instructions on a matter of fact concerning counts 9 and 10 (R. 391-392). The court stated that questions of fact were for the jury to decide and then reiterated some of his earlier general instructions (R. 392-393). Previously, in the course of his main instructions, given before submission of the case to the jury, the trial judge had made it entirely clear to them that in order to convict petitioners on any of the three counts submitted to them, they were required to find petitioners guilty of the precise offense charged in that count (R. 372-374, 377-380). Manifestly, therefore, the judge’s reference to “any offense” in the above quoted supplementary instruction now complained of meant any of the offenses charged in the three counts submitted to the jury; this refer-

ence could not possibly have had the effect, now suggested by petitioners, of misleading the jury as to the nature of their function.*

CONCLUSION

The petition for a writ of certiorari presents no question warranting further review by this Court. We therefore respectfully submit that it should be denied.

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SEPTEMBER 1947.

* Petitioners also contend that counts 10 and 11, alleging acquisitions of meat and sugar ration stamps, respectively, charged but one offense because these stamps were purchased in a single transaction (Pet. 4, 6, 24). The suspended imprisonment sentences of both petitioners on all three counts were made to run concurrently, however, and fines were not imposed on count 10 (*supra*, p. 6). Consequently, it is unnecessary to consider the merits of this contention. *Pinkerton v. United States*, 328 U. S. 640, 641-642, note 1; *Hirabayashi v. United States*, 320 U. S. 81, 85, 105.